

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

DARIAN VERDOUW,

HF No. 19, 2020/21

Claimant,

v.

DECISION

SCOTT/SHAWD FOOD COMPANY, LLC,

Employer,

and

FIRSTCOMP INSURANCE COMPANY

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on October 21, 2021. Claimant, Darian VerDouw, was present and represented by Liam Culhane, Turbak Law Office. The Employer, Scott/Shawd Food Company, LLC and Insurer, Firstcomp Insurance Company were represented by Justin G. Smith of Woods, Fuller, Shultz, and Smith.

Background

On January 14, 2020, Darian VerDouw (VerDouw) suffered an alleged work injury while working for Scott/Shawd Food Company, LLC, which was at all times pertinent insured for workers' compensation purposes by Firstcomp Insurance Company (Employer and Insurer). At the time of the alleged injury, VerDouw was twenty-four (24) years old. VerDouw began her shift around 7:00 AM. Security camera footage shows her moving, walking, and standing without apparent difficulty. Shortly before 11:00 AM,

she was coming in the back door at work when she slipped on the floor, without falling. Her right foot slipped out from under her and twisted. She continued her shift.

About fifteen minutes after the injury, VerDouw called her father, Paul VerDouw (Paul), to pick her up and to also bring pain relievers with him. She continued working until he arrived. Throughout the rest of her time working that day, VerDouw is seen on camera stretching, bracing herself, limping, and repeatedly lifting her right foot and leg off the floor. Paul VerDouw arrived around 1:00 PM to take VerDouw home. After helping her out of his vehicle, he then helped VerDouw crawl up the stairs and into her apartment. VerDouw spent the remainder of the day resting by lying down.

The next day, January 15, 2020, VerDouw woke to increased pain in her hip, and so she continued to rest the injury. Her condition worsened as the day went on, and having realized the pain was not improving, VerDouw texted her manager, Carole Owen (Owen) that she was going to see a doctor. On January 16, 2020, VerDouw was seen by Dr. Pastel Fligge at Prairie Lakes Hospital in Watertown, SD. Dr. Fligge noted that VerDouw complained of right hip pain and that she had slipped at work. Dr. Fligge also noted that VerDouw displayed an abnormal gait usually caused by pain and that VerDouw had suffered a twisting injury to her right hip. VerDouw underwent an X-ray and tests for gout, Lyme disease, rheumatoid arthritis, and other autoimmune/inflammatory diseases. The results were negative. She also noted that VerDouw mentioned diffuse joint pain going on for four months with occasional sharp pain. Dr. Fligge prescribed an NSAID pain reliever and physical therapy.

Directly following her visit with Dr. Fligge on January 16, 2020, VerDouw was seen by physical therapist, Casey Grimsrud. Grimsrud noted that VerDouw reported having joint pain for a few months in her hip, knee, and ankle, and she slipped at work which

increased her pain to as high as a 10/10 rating. He also noted her abnormal gait indicative of pain. During the physical therapy session, VerDouw was limited by her pain to light stretching, limited manual therapy, and ultrasound. He prescribed home exercises, which VerDouw reported to her physician she had completed.

On January 17, 2020, VerDouw called Dr. Fligge's office to report the worsening pain. She was told to stop the NSAID and received a prescription for Lodine. Dr. Fligge's nurse suggested VerDouw go to the hospital emergency room. VerDouw called Dr. Fligge's office three times that morning about her increasing hip pain. The notes from the call indicate that VerDouw had reported sharp, stabbing pain and that her hip would give out. During one of the calls, VerDouw requested an MRI of her hip. Dr. Fligge declined to order the MRI, noting that the X-ray was normal, and since the injury was recent, VerDouw should give it more time. Dr. Fligge also stated that VerDouw could seek orthopedic care on her own, if she wanted.

The Lodine eased VerDouw's pain to the point she felt comfortable leaving the house with a friend. While with her friend, VerDouw tried to put weight on her right foot and felt a pop in her hip. Following the pop, VerDouw's pain was so intense that she was unable to reenter her friend's car without assistance. VerDouw's friend drove her to the emergency room at Prairie Lakes Hospital. A CT scan of VerDouw's hip revealed that the neck of her right femur had fractured and the head of the femur had displaced. She was admitted to the hospital immediately, and orthopedic surgeon, Dr. Michael Vener, performed emergency surgery. The report from the emergency room noted that VerDouw stated she had stepped wrong, heard a popping noise, and was unable to stand on her right leg or walk. The report further noted that VerDouw had sustained a twisting injury and that injury occurred at home.

Employer and Insurer have denied that VerDouw's condition and need for treatment were related to an injury at work. VerDouw's Petition for Hearing was received by the Department of Labor & Regulation on August 24, 2020. The parties stipulated to the bifurcation of the issues in this matter.

Issues Presented at Hearing

1. Causation under SDCL 62-1-1(7); and
2. Compensability under SDCL 62-4-1.

Major Contributing Cause

To prevail in this matter, VerDouw must first prove that the injury sustained on January 17, 2020, was a major contributing cause of her right hip fracture pursuant to SDCL 62-1-1(7). VerDouw has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. She is "not required to prove [her] employer was the proximate, direct, or sole cause of [her] injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652. She also does not need to prove that her work activities were "the' major contributing cause" of the injury; they only have to be "'a' major contributing cause." *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, 21, 816 N.W.2d 843 at 850. "Our law requires a claimant to establish that [her] injury arose out of [her] employment by showing a causal connection between [her] employment and the injury sustained." *Horn v. Dakota Pork*, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41. "The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition." *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 11 808 N.W.2d 107, 111 (citations omitted).

Certain testimony provided by VerDouw has been inconsistent with the medical record and other witnesses' testimony. VerDouw testified that she had been unable to move or do anything between January 14 and January 17. However, testimony from her mother Shawn revealed that VerDouw was waiting for her outside when she arrived to take her to the doctor, having managed the stairs of her apartment without assistance. Shawn's testimony also revealed that VerDouw did not require assistance into the clinic.

Dr. Vener's notes indicate that VerDouw had stated she was in the snow when she felt a pop following a twisting motion, which resulted in severe hip pain and inability to bear weight on her hip. The emergency room report also noted that VerDouw had been walking in snow when she stepped wrong resulting in an audible crack. VerDouw testified that there was no snow, and the displacement occurred while she was getting out of the car. VerDouw asserts that medical records are not always accurate, and she specifically disagrees with Dr. Fligge's records regarding her prior hip pain.

Paul testified at hearing that following the displacement, VerDouw was in such pain that she was unable to communicate clearly and seemed to be delirious. VerDouw testified that she does not remember what she told the medical staff at the emergency room on January 17, 2020, because she does not remember beyond being moved from the vehicle to a wheelchair and the extreme pain she endured. The Department understands that VerDouw's memory of events may have been affected by the passage of time and the pain associated with her injury. Pursuant to case law, "The Department is not required to accept the testimony of the claimant and is free to choose between conflicting testimony." *Kennedy v. Hubbard Mining Co.*, 465 N.W 2d 792, 796 (S.D 1991). Thus, the Department will consider all evidence and defer to that which is most credible.

VerDouw has offered the expert medical opinion of Dr. Vener. “The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion.” *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). Dr. Vener is certified by the American Board of Orthopedic Surgery and the American Academy of Orthopedic Surgery. He has practiced for twenty-five years, and he has been published several times on the topics of trauma, osteoarthritis, and post-traumatic osteoarthritis. VerDouw had seen Dr. Vener before January 14, 2020, for other issues over the previous ten years.

Dr. Vener was on call when VerDouw arrived at the emergency room on January 17, 2020. He examined her and performed the emergency reduction and stabilization of the broken femur. Following the surgery, Dr. Vener oversaw VerDouw’s care for seven months, during which time he examined her eight times, managed her prescriptions and work restrictions, and oversaw her physical therapy until August 25, 2020. He then referred her to Dr. Potter in Sioux Falls when it became apparent that the fracture was not healing properly.

Dr. Vener opined that VerDouw’s January 14, 2020, injury caused a stress fracture to the femoral neck which completed itself on January 17, 2020. He believes the cause of the fracture was the work injury, but the second slip in the snow resulted in the displacement. It is Dr. Vener’s opinion that VerDouw’s January 14, 2020, work injury was the major contributing cause of her displaced hip fracture.

Dr. Vener reviewed VerDouw’s X-ray from January 16, 2020, and interviewed VerDouw’s family to establish her medical history and current condition. He also reviewed the records from her treatment. He did not review the security footage, and he did not know that VerDouw continued her shift the day she slipped at work. Dr. Vener

did not know what caused VerDouw's hip pain four months before the January 16, 2020, slip. Dr. Vener acknowledged that hearing a pop with a stress fracture, as VerDouw did, was uncommon, and that other injuries could cause an individual to feel a pop in a joint that does not involve the formation of a fracture. He further acknowledged that it was more common for someone VerDouw's age to suffer a strained groin muscle rather than a stress fracture.

Employer and Insurer have offered Dr. Walter Carlson as their expert. Dr. Carlson is a board-certified orthopedic surgeon, licensed to practice in five states, and has been licensed in South Dakota since 1983. Dr. Carlson reviewed VerDouw's medical records and security cam footage from January 14, 2020. He also testified live at the hearing. Dr. Carlson concluded that VerDouw suffered the right hip fracture on January 17, 2020, not on January 14, 2020. He opined that there was no objective medical evidence to suggest a stress or hairline fracture was present on January 14, 2020, or that it was caused by VerDouw's slip at work. Therefore, he concluded that the slip incident at her work did not contribute to the hip fracture, and it was not a major contributing cause of her condition. Dr. Carlson agreed, however, with Dr. Vener that a twisting injury could result in a stress fracture and that such a fracture could later displace. He also stated that with a normal X-ray, he could not determine whether a stress fracture was present. Both Dr. Carlson and Dr. Vener agree that stress fractures often do not show up on an X-ray.

The Department has viewed the security camera footage from January 14, 2020. In the footage, VerDouw can be observed to be favoring her right leg, limping, and attempting to stretch and adjust it following the slip at work. She can be seen leaning on the counter apparently to take the weight off of her leg. While she testified that the pain

was “excruciating,” pain is subjective, and is thus difficult to quantify or observe.

However, the footage makes it clear that she had discomfort with her right leg. From this footage and the medical record of her symptoms and treatment, the Department believes that VerDouw sustained an injury to her hip on January 14, 2020.

That two incidents occurred in sequence does not prove that one caused the other. “[A claimant] must do more than prove that an injury sustained at her workplace preceded her medical problems. The axiom “*post hoc, ergo propter hoc*,” refers to ‘the fallacy of ... confusing sequence with consequence,’ and presupposes a false connection between causation and temporal sequence.” *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252. VerDouw must prove more than the mere sequence of events. “[P]roof of causation ‘must be established to a reasonable degree of medical probability, not just possibility.’” *Armstrong v. Longview Farms, LLP.*, 938 N.W.2d 425, 431. (quoting *Darling id.* at 367).

Dr. Vener has provided a probable explanation connecting the slip at work to the femoral displacement. Dr. Vener has opined that the slip probably resulted in a stress fracture that completed itself on January 17, 2022. Dr. Carlson agreed that a twisting injury could lead to a displacement, but he did not believe that there was objective evidence to conclude that is what happened to VerDouw. The Department is persuaded by Dr. Vener’s theory of injury, the consistency of symptoms between the slip and the displacement, and both experts’ agreement that a twisting injury like the slip could result in a stress fracture that VerDouw’s slip at work on January 14, 2020, was a major contributing cause of the femoral displacement she experienced on January 17, 2020.

Additionally, the medical records and VerDouw's testimony indicate that she had dealt with various forms of joint pain throughout her life. Owen testified live at hearing that VerDouw had complained of hip pain and had been concerned that she might have arthritis a few days before her slip at work. Dr. Fligge tested VerDouw for gout, Lyme disease, rheumatoid arthritis, and other autoimmune/inflammatory diseases, and all results were negative. There is no indication that VerDouw suffers from a preexisting condition that caused the femoral displacement or her other symptoms. SDCL 62-1-1(7)(a) and (b) provide, in pertinent part,

An injury is compensable only if it is established by medical evidence, subject to the following conditions:

(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or

(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment

Therefore, VerDouw's injury would still be compensable if she had a preexisting condition as long as the work injury was a major contributing cause of her disability, impairment, or need for treatment.


Conclusion

VerDouw has proven by a preponderance of the evidence that her work-related injury is and remains a major contributing cause of her current condition pursuant to SDCL 62-1-1(7), and she has further proven the compensability of her injury pursuant SDCL 62-4-1.

VerDouw shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this

Decision. Scott/Shawd Food Company, LLC and Firstcomp Insurance Company shall have an additional twenty (20) days from the date of receipt of VerDouw's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, VerDouw shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 9 day of March, 2022.



M. Faw
Administrative Law Judge